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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 613

SOUTHERN PACIFIC COMPANY,
Petitioner,

vs.

THE UNITED STATES.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS AND BRIEF IN SUPPORT THEREOF.

JAMES R. BELL,
Counsel for Petitioner.

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No. 613

SOUTHERN PACIFIC COMPANY,

Petitioner,

vs.

THE UNITED STATES.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS OF THE UNITED STATES.

MAY IT PLEASE THE COURT:

The petition of Southern Pacific Company respectfully shows to this Honorable Court:

A.

Summary and Short Statement of the Matter Involved.

This writ is sought to review the judgment of the Court of Claims dismissing the petition, in Case No. 42403, on its docket, entitled Southern Pacific Company, plaintiff, *vs.* The United States of America, defendant, entered on June 6, 1938, in which a motion for a new trial was filed by your

petitioner on July 19, 1938, and overruled by order of the Court of Claims, entered on November 14, 1938.

This case involves the right of the Government under the provisions of the Land Grant Act of July 25, 1866, 14 Stat. 239, Chap. 242, as amended by the Act of May 23, 1928, Part 1, 45 Stat. 722, Chap. 720, in making settlements for railroad service performed during December, 1931, and January, 1932, to deduct a greater land-grant mileage percentage from charges for the transportation of property of the United States, based on the lawfully published, effective and applicable commercial tariff rates, than represented by the land-grant mileage proportion of the route via which the rates charged were exclusively applicable.

Is the Government entitled to a greater land-grant deduction from charges based on lawfully published, effective and applicable commercial tariff rates than represented by the proportion of land-grant mileage on the route of railroad via which the low tariff rates charged were exclusively applicable or greater than via which the shipments were transported?

The transportation of property of the United States by your petitioner Southern Pacific Company, plaintiff below, involved herein was between Portland or East Portland, Oregon, and San Francisco, California (Special Findings of Fact 2, R. 6).

Your petitioner, during the period of the shipments involved in this case, operated and now operates two lines or routes of railroad between Oregon and California points, including Portland and East Portland, Oregon, and San Francisco, California, in part owned by it and in part leased by it from its subsidiary, Central Pacific Railway Company, owner, both of which lines or routes were and are maintained and operated for freight, passenger and all classes of traffic (Special Findings of Fact 5, R. 7).

One of such routes, for convenience called the Siskiyou Route, was completed in December, 1887 (Special Findings of Fact 13, R. 12-13), and the other, for convenience called the Cascade Route, was completed in September, 1926 (Special Findings of Fact 14, R. 13-15), under necessary authority of the Interstate Commerce Commission issued in accordance with paragraph (18) of Section 1 of the Interstate Commerce Act, upon a finding by the Commission that the present and future public convenience and necessity required the construction of this line of railroad (*Finance Docket No. 2873*, 82 I. C. C. 185).

Since the completion of the construction of the lines of railroad constituting the Cascade Route in 1926, your petitioner has had and now has two complete lines of railroad or routes in Oregon and northern California, one the Siskiyou Route, serving the Sacramento and Shasta Valleys in California, and the Willamette, Umqua and Rogue River Valleys in Oregon, producing much tonnage of timber, agricultural products, livestock, etc. (Special Findings of Fact 13 (a) and 15, R. 12-13, 15-16), and the other, the Cascade Route, also serving large timber areas and agricultural and livestock producing areas (Special Findings of Fact 14 and 15, R. 13-15, 15-16).

Your petitioner has maintained the Siskiyou Route transporting a substantial and varied traffic and serving a large and important area. The Siskiyou Route and the Cascade Route are two separate and distinct routes or lines of railroad, necessary for adequate transportation service to the interested areas or territories traversed by such lines (Special Findings of Fact 15, R. 15-16).

258.13 miles of the Cascade Route between Portland or East Portland, Oregon, and San Francisco, California, were constructed with the aid of lands granted by Congress, for which land-grant mileage, the Government was and is en-

titled to have its property or troops transported for compensation 50 per centum of the charges to the public at large or private parties, based on the lawfully published and effective tariff rates applicable via this route for like transportation service (Special Findings of Fact 6 (b), R. 7-8,).

The land-grant deduction proportion of such charges via the Cascade Route was and is 17.801 per cent between Portland, Oregon, and San Francisco, California, and 17.819 per cent between East Portland, Oregon, and San Francisco, California (Special Findings of Fact 6 (c), R. 8).

663.16 miles of the Siskiyou Route between Portland or East Portland, Oregon, and San Francisco, California, were constructed with the aid of lands granted by Congress, for which land-grant mileage, the Government was and is entitled to have its property and troops transported for compensation 50 per cent of the charges to the public at large or private parties, based on the lawfully published and effective tariff rates applicable via this route for like transportation service (Special Findings of Fact 7 (b), R. 9).

The land-grant deduction proportion of such charges via the Siskiyou Route was and is 42.792 per cent between Portland, Oregon, and San Francisco, California, and 42.831 per cent between East Portland, Oregon, and San Francisco, California (Special Findings of Fact 7 (c), R. 10).

On about 75 per cent of the total freight traffic transported by your petitioner on these routes between Oregon and California, the tariff rates are and have been since November, 1931, the same via both the Siskiyou and Cascade Routes, including the rates between Portland or East Portland, Oregon, and San Francisco, California. On approximately 25 per cent of such freight traffic, the lawfully published and effective tariff rates via the Cascade Route have been since November, 1931, and are now lower than via the Siskiyou Route (Special Findings of Fact 20, R. 20-21). This was the result of decisions and rulings of the Interstate

Commerce Commission, an agency of Congress, in its administration of the Fourth Section of the Interstate Commerce Act as amended by the *Transportation Act of 1920*, Sections 418-421, 41 Stat. 484-488. The Interstate Commerce Commission refused to permit your petitioner to establish and maintain Fourth Section rates between the terminals, Portland or East Portland, Oregon, and San Francisco, California, for application via the Siskiyou Route, sufficiently low to enable it to compete for this 25 per cent water-borne freight traffic of coastwise steamship lines operating between Oregon and California ports. Because of the substantially lower cost of hauling freight over the Cascade line or route than over the Siskiyou line or route, on account of lesser grades, curvatures, operating difficulties and somewhat shorter distance on the Cascade Route, the Commission found that the lower Fourth Section rates to enable obtaining some of this traffic in competition with coastwise steamship lines would be reasonably compensatory under the amended Fourth Section and authorized their establishment and maintenance via the Cascade Route. The Commission, on its own motion, required your petitioner to readjust the rates so there would be no departures from the long-and-short-haul provision of the Fourth Section via the Siskiyou Route. Your petitioner established rates via the Siskiyou Route between Oregon and California points, including Portland, Oregon, and San Francisco, California, and rates to, from, and between intermediate points on the Siskiyou Route, which were lower than the rates theretofore found to have been reasonable on the Siskiyou line or route by the Interstate Commerce Commission. These were the rates in effect via the Siskiyou Route during the period of the shipments involved in this case, 1931-1932, between Portland or East Portland, Oregon, and San Francisco, California, and are now maintained by your

petitioner via the Siskiyou Route. All as shown more in detail in the Special Findings of Fact of the Court of Claims (Special Findings of Fact, 16, 17, 20, R. 16-19, 20-21). Succinctly stated, the lower Fourth Section terminal rates exclusively applicable via the Cascade Route on the 25 per cent of traffic which was and is water-competitive, were compelled by an Act of respondent's Congress, administered by its authorized agent, the Interstate Commerce Commission. The particular shipments of respondent involved in this case were within the 25 per cent of the traffic on which the rates were lower via the Cascade Route than via the Sisikiyou Route (Special Findings of Fact 10, R. 10-11).

In October, 1931, prior to the above-described revision of rates via the Siskiyou and Cascade Routes, effective November 11, 1931, your petitioner gave written notice to the Coordinator of Traffic of the Federal Traffic Board of respondent in Washington, who was in charge of routing Government freight, of the proposed changes in rates via these Routes, the manner in which same would be applied, and advised such Coordinator of Traffic that either the Siskiyou Route or the Cascase Route could and would be used and that your petitioner would respect the Government's routing as to either line. Further, that the Fourth Section terminal rates via the Cascade Route less the land-grant deduction via that Route that would be available would make a less net charge to the Government than the use of the rates via the Siskiyou Route. Receipt of this communication was acknowledged by the Coordinator of Traffic in October, 1931 (Special Findings of Fact 19, R. 20).

There is no finding by the Court of Claims that your petitioner has ever failed or refused to adequately and satisfactorily transport property of the United States via the Siskiyou Route when requested so to do or that any dissatisfaction with the service afforded via the Siskiyou Route

has ever been expressed by any representative of respondent.

The shipments involved in this case were unrouted by the shipper-representatives of respondent as to any particular line or route of your petitioner between East Portland or Portland, Oregon, and San Francisco, California, the points of origin and destination of such shipments (Special Findings of Fact 4, R. 6). In other words, your petitioner was not requested or required to transport these shipments via the Siskiyou Route.

Your petitioner handled and charged for this unrouted traffic in the same manner as it was legally obligated to handle and charge for unrouted traffic of shippers generally. *Brownyard* v. *Union P. R. Co.*, 148 I. C. C. 444, 445, 446. Your petitioner transported such unrouted shipments of respondent over the more economical and less costly operated part of the Cascade Route as compared with the Siskiyou Route and assessed charges against and billed respondent on the basis of the lowest net charges via any route of your petitioner between Portland or East Portland, Oregon, and San Francisco, California, which was on the basis of the lowest lawfully published and effective commercial tariff rates for the transportation of such shipments, restricted to and applicable only via the Cascade Route, less 50 per cent for the land-grant deduction proportions on the Cascade Route of 17.801 per cent for transportation between Portland, Oregon, and San Francisco, California, and 17.819 per cent for transportation between East Portland, Oregon, and San Francisco, California (Special Findings of Fact 11, 12 (a) and 21, R. 11, 12, 21).

Respondent, through its General Accounting Office, made payments to your petitioner for the transportation of these shipments on the basis of the deduction from the total charges computed by applying the lawfully published and

effective commercial tariff rates for like transportation service to the public at large or private parties, restricted to and applicable only via the Cascade Route, between Portland or East Portland, Oregon, and San Francisco, California, 50 per cent for the higher land-grant deduction proportions of 42.792 per cent and 42.831 per cent, on the Siskiyou Route, respectively, applicable to commercial tariff charges to the public at large or private parties for transportation service between such points or terminals, via the Siskiyou Route, via which route such low tariff rates did not apply (Special Findings of Fact 12 (b), R. 12).

Your petitioner accepted such payments under protest and brought suit in the Court of Claims to test the right of respondent to enlarge your petitioner's obligations under the clear and unambiguous provisions of the Land-Grant Act contract and to recover the balance due (Special Findings of Fact 12 (c), R. 12). Its petition was dismissed by the Court of Claims and a review of such judgment is here sought.

B.

Reasons Relied on for the Allowance of the Writ.

1. Section 5 of the Act of July 25, 1866, 14 Stat. 239, Chap. 242, as amended by the Act of May 23, 1928, Part 1, 45 Stat. 722, Chap. 720, making the line of railroad on the Siskiyou Route between East Portland, Oregon, and Roseville, California, a 50 per cent land-grant line, covers the obligations of your petitioner and the rights of respondent so far as concerns the question here presented.

Section 5 of this Land-Grant Act of July 25, 1866, reads as follows:

> *And be it further enacted*, That the grants aforesaid are made upon the condition that the said companies shall keep said railroad and telegraph in repair and use and shall at all times transport the mails upon said rail-

road, and transmit despatches by said telegraph line for the government of the United States, *when required so to do by any department thereof*, and that the government shall at all times have the preference in the use of said railroad and telegraph therefor at fair and reasonable rates of compensation, not to exceed the rates paid by private parties for the same kind of service. And said railroad shall be and remain a public highway for the use of the government of the United States, free of all toll or other charges upon the transportation of the property or troops of the United States; and the same shall be transported over said road at the cost, charge, and expense of the corporations or companies owning or operating the same, *when so required by the government of the United States.* (Italics ours.)

Your petitioner has fully complied with all of its obligations to the Government under this Land-Grant Act contract as shown by comparison between its clear and unambiguous provisions and the Special Findings of Fact of the Court of Claims hereinbefore referred to, upon which, this Court has held that the case must be decided unaffected by any statement of fact, reasoning, or conclusion which may be found in the opinion of the lower court.

M. E. Blatt Company, Petitioner, v. *United States*, Opinion, United States Supreme Court, December 5, 1938, 59 S. Ct. Rep. 186;
Stone v. *United States*, 164 U. S. 380, 383;
Crocker v. *United States*, 240 U. S. 74, 78;
Brothers v. *United States*, 250 U. S. 88, 93;
United States v. *Wells*, 283 U. S. 102, 120;
United States v. *Esnault-Pelterie*, 299 U. S. 201, 206.

2. The respondent is only entitled to the land-grant proportion deduction from charges to the general public or private parties based on commercial tariff rates in effect and applicable via the route which includes the amount of

land-grant mileage for which the deduction is made. The Government is not entitled to compute deductions from such commercial charges based on a greater land-grant mileage proportion than exists on the route via which the commercial tariff rates charged on these unrouted shipments were exclusively applicable. In other words, the Government is not entitled to have a substantial railroad mileage constructed at great cost with private capital and unaided in any way by land grant or other Government assistance converted into land-grant mileage but this is in effect precisely what the judgment of the Court of Claims accomplishes.

The Land-Grant Railroad Cas., 15 C. Cls. 126, 139, 142;
Lake Superior & Mississippi R. R. Co. v. *United States*, 93 U. S. 442, 454, 455;
Southern Pacific Company v. *United States*, 237 U. S. 202;
L. & N. R. R. v. *United States*, 273 U. S. 321, 323.

3. The judgment of the Court of Claims imposes an obligation on your petitioner and vests a right in respondent, the Government, not assumed by your petitioner or conferred upon the Government under the clear and unambiguous provisions of the Land-Grant Act contract and would deprive your petitioner of its property without due process of law and without just compensation in contravention of the provisions of the Fifth Amendment.

United States v. *Central Pacific R. R. Co.*, 118 U. S. 235, 240, 241;
United States v. *Northern Pacific Ry. Co.*, 256 U. S. 56, 64;
Boeing Air Transport v. *Farley*, 75 F. (2d) 765, 767.

4. (a) The terms of your petitioner's obligation under the clear and unambiguous provisions of the Land-Grant Act contract have been expanded by construction in the opinion

of the Court of Claims, in arriving at its judgment, in contravention of the rule of law announced in decisions of this Honorable Court too numerous for complete citation here.

United States v. *Galveston, Harrisburg & San Antonio Ry. Co.*, 279 U. S. 401, 404;

United States v. *Missouri Pacific Railroad Company*, 278 U. S. 269, 277;

United States v. *Shreveport Grain & Elevator Co.*, 287 U. S. 77, 84;

Caminetti v. *United States*, 242 U. S. 470, 485;

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Doggett v. *Railroad Company*, 99 U. S. 72, 77, 78.

(b) In addition, the stated past administrative practice of respondent's accounting officers in making settlements and the alleged acquiescence by railroads, including your petitioner, therein, also the stipulations of the parties in *United States* v. *Northern Pacific Railway Company*, 30 F. (2d) 655, to which great weight is given in the opinion of the Court of Claims in expanding by construction the unambiguous terms of this Land-Grant Act obligation (R. 26, 27, 28, 29) are not mentioned in and are wholly unsupported by the Court's Special Findings of Fact.

5. The opinion and judgment of the Court of Claims changes the unambiguous written obligation of your petitioner set out in the Land-Grant Act by erroneously assuming and considering, without reference to or discussion of the provisions of this Land-Grant Act contract, that your petitioner was and is obligated thereunder not to use the more economical and less costly operated Cascade Route for through traffic, when not routed by the shipper or respondent via the Siskiyou Route (R. 28). Such is not the contract.

6. Certain statements of fact or conclusions in the opinion of the Court of Claims, to which it appears that considerable weight is given, either conflict with or are unsupported by the Special Findings of Fact of the Court.

(a) The statement in the opinion of the Court of Claims that for reasons stated in detail in the Findings, your petitioner secured authority from the Interstate Commerce Commission to increase the existing rates over the Siskiyou Route and reduce the rates over the Cascade Route (R. 25), conflicts with the Court's Special Findings of Fact (Special Findings of Fact 16 and 17, R. 16-20), which are, in substance, that your petitioner sought authority from the Interstate Commerce Commission to establish the low rates via the Siskiyou Route, which was denied by the Commission; that the Commission authorized such rates via the Cascade Route and denied all of your petitioner's applications for Fourth Section Relief on the Siskiyou Route. The law compelled the increases in rates via the Siskiyou Route to remove prohibited Fourth Section departures. Your petitioner did not seek or secure authority to increase the rates over the Siskiyou Route as stated in the opinion of the court but this was compelled by order of the Interstate Commerce Commission without request by your petitioner.

(b) The reference in the opinion of the court to the rates via the Siskiyou Route as excessive rates in line five (R. 29), conflicts with the Court's Special Findings of Fact 17, R. 19-20, which is that your petitioner established and maintains rates via the Siskiyou Route lower than rates which have been found to be reasonable for application via the Siskiyou Route by the Interstate Commerce Commission. Therefore, such rates could not be excessive as stated in the opinion of the court. In addition, if at any time the Government thinks that the rates maintained by your peti-

tioner via the Siskiyou Route are not reasonable, it has the same right as any other shipper to apply to the Interstate Commerce Commission for readjustment of such rates. Sec. 1, (4); (5), (6), and Sec. 13, Interstate Commerce Act, 41 Stat. 475, 36 Stat. 550.

(c) The conclusion in the opinion of the Court (R. 28) is that while the land-grant portions of the Siskiyou Route between Springfield Junction and Black Butte via Ashland, and between Tehama and Roseville, have not been abandoned and have been kept in good repair by your petitioner and are open for through traffic between San Francisco, California, and Portland, Oregon, the practical effect of the tariff provisions restricting the application of the lower scale of rates via the Cascade Route is to force shippers, including the United States, to use the Cascade Route except in unusual and rare instances. In view of the judgment of the Court of Claims, the implication of this conclusion must be that your petitioner is responsible and is blamed for this difference in rates between the Siskiyou and Cascade Routes. (The difference applies on only 25 per cent of the traffic as shown in Special Findings of Fact 20, R. 20-21). Such implication conflicts with the Court's Special Findings of Fact (Special Findings of Fact 16 and 17, R. 16-20) which show that this difference in rates was caused by an Act of Congress, administered by its agent, the Interstate Commerce Commission, and was not sought by your petitioner. *Transportation Act of 1920,* by which the Fourth Section of the Interstate Commerce Act was amended, Secs. 418-421, 41 Stat. 484-488; *Transcontinental Cases of 1922,* 74 I. C. C. 48, 70, 71, in which the 1920 amendment was interpreted by the Commission.

(d) The reference to train service over the Cascade and Siskiyou Routes, in the opinion of of the Court (R. 28-29), to which considerable weight appears to be given, is imma-

terial under the Special Findings of Fact of the Court. The Findings referred to in the preceding summary and statement, in part, are:

The Siskiyou and Cascade Routes are separate and distinct routes serving and necessary to different territories, both of which are maintained and operated for freight, passenger, and all classes of traffic by your petitioner. There is no Finding that your petitioner has ever failed or refused to provide adequate and satisfactory train service on the Siskiyou Route for the Government or for anyone else routing shipments or requesting service via the Siskiyou Route. It is immaterial what the comparative train service via the Siskiyou Route may have been at the time of these shipments. There is no Finding of any demand or request for any different character of freight train service on the Siskiyou Route by anyone, including the Government. The shipments here involved were unrouted and no service via the Siskiyou Route, to use the language of the Land-Grant Act contract, was required by the Government of the United States. There has been no breach by your petitioner of its obligations under this contract. In addition, if at any time the Government should think that the train service of your petitioner via the Siskiyou Route is not adequate and reasonable, it has the same right as any other shipper to apply to the Interstate Commerce Commission for the determination of the facts and an appropriate order, over which matters the Commission has jurisdiction. Sec. 1, (10), (11), (14), Interstate Commerce Act, 41 Stat. 476.

Johannesburg Mfg. Co. v. *Michigan Central R. Co.*, 151 I. C. C. 61.

WHEREFORE your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Court of Claims, com-

manding that court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket No. 42403, Southern Pacific Company, plaintiff, *vs.* The United States, defendant, and that the said judgment of the Court of Claims may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

SOUTHERN PACIFIC COMPANY,
By JAMES R. BELL,
Counsel for Petitioner.

Dated, Washington, D. C., January 24, 1939.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 613

SOUTHERN PACIFIC COMPANY,

Petitioner,

vs.

THE UNITED STATES.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinion of the Court Below.

The opinion of the Court of Claims in this case has not been reported but as required is a part of the record filed herein.

II.

Jurisdiction.

The judgment of the Court of Claims in this case was rendered on June 6, 1938. A motion for a new trial was filed by plaintiff, your petitioner, on July 19, 1938 (Rule 91 of the Rules of the Court of Claims of the United States, effective March 10, 1936). The Court of Claims entered

an order on November 14, 1938, overruling plaintiff's motion for a new trial (R. 29).

Your petitioner invokes the judgment of this Court under Section 3 (b) of the Act of February 13, 1925 (Chap. 229, 43 Stat. 936, 939).

III.

Statement of the Case.

A concise statement of the case containing all that is material to the consideration of the question presented, based entirely upon the Special Findings of Fact of the Court of Claims, with references to such by number and with appropriate page references to their place in the record, is made in the petition for writ of certiorari. To avoid repetition, your petitioner respectfully asks that such statement of the petition be considered a part of this brief. Further discussion of the facts is made hereinafter in the argument.

IV.

Specification of Errors Intended to be Urged.

The Court of Claims erred:

1. In deciding upon its Special Findings of Fact, as a conclusion of law, that your petitioner is not entitled to recover and in dismissing its petition.

2. In not deciding, based upon its Special Findings of Fact, that your petitioner has fully complied with its obligations to the Government on the Siskiyou Route, under the provisions of the Land-Grant Act of July 25, 1866, as amended by the Act of May 23, 1928, and is entitled to recover.

3. In expanding by construction the clear and unambiguous terms of your petitioner's obligations to the Govern-

ment under the Land-Grant Act contract on the Siskiyou Route.

4. In considering and attaching weight in its opinion in arriving at its judgment, to alleged matters or statements of fact or conclusions which are not mentioned in, are wholly unsupported by and in part conflict with the court's Special Findings of Fact.

V.

Argument.

It is thought that the statement of the matter involved, based on the Special Findings of Fact of the lower court, and the reasons relied on for the allowance of the writ, including citations of authorities, in the petition, are sufficiently comprehensive from standpoint of fact and law to sustain the assignments of error here made and to justify the issuance of the writ sought. In further support of such assignments of error, it may be informative to briefly analyze the opinion of the Court of Claims in the light of your petitioner's land-grant contractual obligations to the Government and the Special Findings of Fact of the lower court.

A.

The Court of Claims Erred in Not Deciding Upon Its Special Findings of Fact That Your Petitioner Has Fully Complied With Its Obligations to the Government Under the Land-Grant Act Contract and is Entitled to Recover.

Leaving aside for the present, the question of the erroneous expansion of the clear and unambiguous terms of your petitioner's obligations under the Land-Grant Act contract, and the consideration of matters in the opinion of the lower court, which are unsupported by or in conflict

with the court's Special Findings of Fact. Although not expressly so stated, the court by necessary implication concluded that your petitioner has breached its Land-Grant Act contract with the Government respecting the Siskiyou Route and that this entitled the Government, in making settlements with your petitioner, to the greater Siskiyou Route land-grant mileage deductions from charges based on the low Fourth Section commercial tariff rates on these shipments not applicable via the Siskiyou Route but applicable only to shipments via the Cascade Route which has less land-grant mileage.

This conclusion is arrived in the opinion of the court without any mention or discussion whatever of the provisions of Section 5 of the Land-Grant Act of July 25, 1866, set out in the appendix hereto, covering the obligations of your petitioner and the rights of respondent.

The reasons stated in the opinion of the Court of Claims appear to be:

(a) That your petitioner has practically abandoned through traffic on the Siskiyou Route (R. 28).

(b) That your petitioner now transports through traffic for the general public on the Cascade Route which, before the completion of the Cascade Route, it transported over the Siskiyou Route (R. 28).

(c) The difference in the rates on 25 per cent of the traffic between the two routes, the court stating that the practical effect of the tariff provisions restricting the application of the lower scale of rates via the Cascade Route is to force shippers, including the United States, to use the Cascade Route except in unusual and rare circumstances (R. 28-29).

(d) That there could be no inducement to a shipper to use the route via the old land-grant-line (the Siskiyou Route), in view of excessive rates and your petitioner's

general routing practice in operating its manifests or through train service over the Cascade Route with only local train service scheduled and operated over the Siskiyou Route (R. 29).

In the contract between the parties, being Section 5 of the Act of July 25, 1866, as amended by the Act of May 23, 1928, making the railroad on the Siskiyou Route between East Portland, Oregon, and Roseville, California, a 50 per cent land-grant-line, your petitioner's obligations and the corresponding rights of the Government thereunder are clearly set out. Your petitioner is obligated:

(1) To keep said railroad and telegraph in repair and use, and transport the mails thereon and transmit dispatches by said telegraph line for the Government, *when required so to do by any department thereof;*

(2) To give the Government preference in the use of said railroad and telegraph therefor at fair and reasonable rates of compensation, not to exceed the rates paid by private parties for the same kind of service;

(3) That said railroad shall be and remain a public highway for the use of the Government of the United States and (as amended by the Act of May 23, 1928) charges for transportation of property or troops of the United States to be 50 per cent less for the land-grant mileage proportion of the route than charges to the general public based on commercial rates for transportation over said railroad;

(4) That property or troops of the United States shall be transported over said railroad (the Siskiyou Route) *when so required by the Government of the United States.*

There is no Finding of Fact in the Special Findings of Fact of the Court of Claims that your petitioner has, in any respect, failed to fully comply with its obligations under this contract. This case involves the transportation of

freight and there is no question presented respecting the transportation of troops or the mails upon such railroad or the transmission of despatches by telegraph line, when required so to do by any department of the United States. The contract clearly provides that petitioner shall transport property or troops of the United States over the land-grant Siskiyou Route, *when so required by the Government of the United States.* There is nothing in the Special Findings of Fact of the lower court showing that your petitioner has ever failed or refused to comply satisfactorily with this obligation to transport property or troops of the United States over the Siskiyou Route, *when so required by the Government,* or has failed in any other respect to fulfill its obligations. There is no Finding in the Special Findings of Fact of the lower court that the adequacy of your petitioner's freight train service via the Siskiyou Route has ever been questioned by any representative of the Government or department of the Government having any connection with transportation of freight of the Government or by the accounting officers of the Government. Not only do such Findings not show that your petitioner has ever failed or refused to transport property or troops of the United States adequately and satisfactorily via the Siskiyou Route but there is no Finding that any request or requirement by the Government of the United States in any instances or particular instance has been made that your petitioner do so. *This is the requirement of the contract.*

In the instant case, the shipments in question were unrouted by the Government as to any particular route of your petitioner. (Special Findings of Fact 4, R. 6). If the Government had routed such shipments via the Siskiyou Route, this would have been a requirement, as provided in the contract, that the shipments be so transported by your petitioner. The Special Findings of Fact of the lower court show that your petitioner, complying with its duty under the

general law, *Brownyard* v. *Union P. R. Co.*, 148 I. C. C. 444, 445, 446, gave the Government the benefit of the lowest available net charge on each of such shipments between Portland or East Portland, Oregon, and San Francisco, California. These lowest net charges were based upon the applicable commercial lower Fourth Section rates restricted to the Cascade Route, less the appropriate land-grant deductions represented by the land-grant mileage on that route to which such rates were restricted and only applied (Special Findings of Fact 11, 12 (a), R. 11, 12).

So far as concerns the reasons stated in the opinion of the Court hereinbefore set out as (a) and (b), that your petitioner has practically abandoned through traffic on the Siskiyou Route and transports through traffic for the general public on the more economical Cascade Route, which it previously transported over the Siskiyou Route, the attention of the Court is called to the clear and unambiguous provisions of this Land-Grant Act contract. Your petitioner is obligated to keep the railroad and telegraph in repair and use and to transport property or troops of the United States thereover when so required by the Government of the United States. It is not obligated to the Government to transport any particular amount of through freight traffic for the general public via the Siskiyou Route and the law does not require it to do so unless the shipper routes such traffic via the Siskiyou Route.

Your petitioner has not abandoned the Siskiyou Route for traffic of any description. The Court of Claims finds in its opinion that the Siskiyou Route has not been abandoned by your petitioner and has been kept in good repair and is open for through transportation between San Francisco and Portland (R. 28). This is fully supported by the Special Findings of Fact. Special Findings of Fact 5 (R. 7), is that your petitioner has maintained and operated both the Siskiyou and Cascade Lines or Routes for freight, passenger and all classes of traffic. Through traffic is a class of

traffic. Special Findings of Fact 15 (R. 15-16), is that your petitioner has two complete lines of railroad or routes, one the Siskiyou Route, serving the valleys and areas described, producing much tonnage of timber, agricultural products, livestock, etc., and the other, the Cascade Route, also serving large timber areas and agricultural and livestock producing areas, each of these lines of railroad serving producing areas quite generally at all points. It is also found that your petitioner has maintained the Siskiyou Route, transporting a substantial and varied traffic and serving a large and important area, and it is further found that the Siskiyou Route and the Cascade Route are two separate routes or lines of railroad, necessary for adequate transportation service to the interested areas or territories traversed by such lines.

Completion of the construction of the Cascade Route was found by the Interstate Commerce Commission to be required by the present and future public convenience and necessity and such construction was authorized by the Commission under the provisions of paragraph (18) of Section 1 of the Interstate Commerce Act in *Finance Docket No. 2873*, 82 I. C. C. 185.

There has been no abandonment in any respect of the Siskiyou Route or any part thereof. This would require authority of the Interstate Commerce Commission under the provisions of paragraph (18) of Section 1 of the Interstate Commerce Act requiring a certificate based on the finding that the present or future public convenience and necessity permit of such abandonment, which, in view of the Special Findings of Fact herein, obviously could not be obtained.

Referring to the third reason appearing in the opinion of the lower court, hereinbefore shown as paragraph (c), respecting the difference in the rates between the two routes

on 25 per cent of the traffic (Special Findings of Fact 20, R. 20-21): Your petitioner has not forced shippers, including the United States, to use the Cascade Route. Your petitioner sought but was not permitted to establish rates via the Siskiyou Route sufficiently low to enable it to participate in the traffic susceptible of water transportation by coastwise lines, via the Siskiyou Route. Shippers would not ship via the Siskiyou Route at the minimum rates authorized by the Interstate Commerce Commission. The lower Fourth Section terminal rates were authorized by the Interstate Commerce Commission for application via the Cascade Route because of the lower cost of operation via that route (Special Findings of Fact 16, 17, 20, R. 16-19, 19-20, 20-21). Manifestly it cannot be held that your petitioner has breached its Land-Grant contract with the Government by not establishing rates sufficiently low via the Siskiyou Route to obtain traffic from shippers for transportation via this route in competition with coastwise steamship lines when the laws of respondent, the United States, the other party to the contract, prevented it from so doing as shown in the Special Findings of Fact above referred to. This difference in rates between the two routes resulted from decisions of the Interstate Commerce Commission in the administration of the *Fourth Section* of the *Interstate Commerce Act* as amended by the *Transportation Act of 1920*, Secs. 418-421, 41 Stat. 484-488, interpreted by the Interstate Commerce Commission in *Transcontinental Cases of 1922*, 74 I. C. C. 48, 70, 71. The Transportation Act evinced an enlarged and different policy upon the part of Congress. In passing upon the reasonableness and lawfulness of rates for the future, the Interstate Commerce Commission speaks as the Legislature and its pronouncement has the force of a statute. *Arizona Grocery Co.* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 284 U. S. 370, 385, 386.

The fourth reason in the opinion of the Court (d) is that there could be no inducement to a shipper to use the route via the old land-grant line (the Siskiyou Route) in view of the excessive rates and your petitioner's general routing practice in operating its manifests or through train service over the Cascade Route with only local train service scheduled and operated over the Siskiyou Route. This reference to excessive rates, as will hereinafter be pointed out, directly conflicts with the Court's Special Findings of Fact. This reference to train service is mentioned in the petition. Under the Special Findings of Fact of the Court that the Siskiyou Route is maintained and operated by your petitioner for freight, passenger and all classes of traffic, the lower court stating in its opinion that your petitioner has not abandoned the Siskiyou Route but has kept same in good repair and open for through traffic, it is immaterial what the comparative train service may have been at the time of these shipments. These shipments, as shown, were unrouted by the Government. There is no Finding that the Government requested your petitioner to transport these shipments via the Siskiyou Route, which is the provision of the Land-Grant contract, and there is no Finding that your petitioner has ever failed or refused to provide adequate and satisfactory train service on the Siskiyou Route for the Government or for any shipper routing shipments or requesting service via this route. The Interstate Commerce Commission has jurisdiction under the provisions of the Interstate Commerce Act, 41 Stat. 476, to require adequate and satisfactory train service via any route upon the complaint of shippers, including the Government. *Johannesburg Mfg. Co.* v. *Michigan Central R. Co.*, 151 I. C. C. 61.

As to the inducement to a shipper to use the route, referred to in the Court's opinion, it is submitted that on the 25 per cent of the traffic which is water-competitive your petitioner did its best to induce shippers to use the Siski-

you Route by undertaking to obtain from the Interstate Commerce Commission the necessary authority under the *Fourth Section* of the *Interstate Commerce Act*, as amended by the *Transportation Act of 1920*, to establish rates sufficiently low over the Siskiyou Route, including the rates between Portland or East Portland, Oregon, and San Francisco, California, to obtain some of this traffic from shippers in competition with coastwise steamship lines for transportation via the Siskiyou Route. The laws of the United States prevented this and there was and is nothing that your petitioner can do to induce shippers to use the Siskiyou Route. Furthermore, as seen from an examination of the clear and unambiguous provisions of the Land-Grant Act contract, such imposes no obligation on your petitioner not to use the more economical and less costly operated Cascade Route for through traffic of the general public when such is not routed via the Siskiyou Route by the shipper. Under the provisions of *Section 15(8)* of the *Interstate Commerce Act* shippers have the right to determine and designate over which line or route their traffic shall be transported and railroads are obligated to observe such routing instructions of the shipper. There is no Finding in the Special Findings of Fact that shippers are not routing their traffic via the Cascade Route and there is no Finding of any demand, request, or reason for any different character of freight train service via the Siskiyou Route than afforded by your petitioner.

Prior to the revision of rates via the Cascade and Siskiyou Routes resulting from the decision of the Interstate Commerce Commission, your petitioner gave written notice to the Government that either the Siskiyou or Cascade Route could and would be used and that your petitioner would respect the Government's routing as to either line (Special Findings of Fact 19, R. 20).

B.

The Court of Claims Erred in Expanding by Construction the Clear and Unambiguous Terms of Your Petitioner's Obligations to the Government Under the Land-Grant Act Contract.

In the opinion of the Court of Claims (R. 26, 27, 29), controlling weight in arriving at its decision is given to what is stated to have been the past administrative method or construction of respondent's accounting officers in making like settlements with land-grant railroads, thus expanding the clear and unambiguous terms of your petitioner's obligations under the Land-Grant Act contract. This is the effect of the judgment although there is no mention of the language of the Land-Grant Act in the opinion of the Court. As will be hereinafter pointed out, there is no mention in the Special Findings of Fact of the court of any method of settlement employed by respondent's accounting officers in the past.

It is not allowable to interpret what has no need of interpretation and long usage is of no avail against a plain statute.

In *United States* v. *Galveston, Harrisburg & San Antonio Ry. Co.*, 279 U. S. 401, 404, this Court held:

> The right of the United States to have the concessions and allowances in respect of transportation made by the carriers in consideration of the aid given is a continuing one. It is of great value to the Government and of course correspondingly burdensome to the carriers. *The terms of the obligation are to be sensibly and fairly read according to the words employed and not expanded or restricted by construction.* (Italics ours.) When considering another question arising under a like provision in a land grant Act, this Court said: "It might be very convenient for the Government to have more

rights than it has stipulated for; but we are on a question of construction, and on this question the *usus loquendi* is a far more valuable aid than the inquiry what might be desirable." *Lake Superior & Mississippi R. R. Co.* v. *United States*, 93 U. S. 442, 454.

In *United States* v. *Missouri Pacific Railroad Company*, 278 U. S. 269, 277, this Court said:

> We are therefore bound by the words employed and are not at liberty to conjure up conditions to raise doubts in order that resort may be had to construction. It is elementary that where no ambiguity exists there is no room for construction.

In *Hamilton* v. *Rathbone*, 175 U. S. 414, 421, this settled rule is announced:

> Indeed the cases are so numerous in this court to the effect that the province of construction lies wholly within the domain of ambiguity, that an extended review of them is quite unnecessary. The whole doctrine applicable to the subject may be summed up in the single observation that prior acts may be resorted to, to *solve*, but not to *create* an ambiguity.

See also

United States v. *Shreveport Grain & Elevator Co.*, 287 U. S. 77, 84;
Caminetti v. *United States*, 242 U. S. 470, 485;
Houghton v. *Payne*, 194 U. S. 88, 99, 100;
United States v. *Graham*, 110 U. S. 219, 221;
Doggett v. *Railroad Company*, 99 U. S. 72, 77, 78.

C.

The Court of Claims Erred in Considering and Attaching Weight in Its Opinion in Arriving at Its Judgment, to Alleged Matters or Statements of Fact or Conclusions Which Are Not Mentioned In, Are Wholly Unsupported By, and in Part Conflict With, the Court's Special Findings of Fact.

The correctness of the judgment of the Court of Claims depends upon its Special Findings of Fact, made a part thereof, without regard to statements of fact, reasoning or conclusions that may be found in its opinion.

In *M. E. Blatt Company, Petitioner,* v. *United States,* Opinion, United States Supreme Court, December 5, 1938; 59 S. Ct. Rep. 186, 189, in reviewing a judgment of the Court of Claims, this Court said:

> Concretely, the question presented is whether, under the lease here involved, one-tenth of what the commissioner and taxpayer call and agree to be "estimated depreciated value," as of the end of the term, was income to petitioner in the first year of the term. *And that question is to be decided upon the lower court's special findings unaffected by any statement of fact, reasoning, or conclusion that may be found in its opinion.* (Italics ours.)

The same ruling is announced in the following decisions:

Stone v. *United States,* 164 U. S. 380, 383;
Crocker v. *United States,* 240 U. S. 74, 78;
Brothers v. *United States,* 250 U. S. 88, 93;
United States v. *Wells,* 283 U. S. 102, 120;
United States v. *Esnault-Pelterie,* 299 U. S. 201, 206.

Great weight appears to be given in the opinion of the Court of Claims to the following statements of fact or conclusions, which are not mentioned in and are wholly unsupported by the court's Special Findings of Fact.

(a) The past administrative method, practice or construction of respondent's accounting officers in making settlements with land-grant railroads (R. 26, 27, 29).

(b) The stipulations of the parties in *United States* v. *Northern Pacific Railway Company*, 30 F. (2d) 655 (R. 26-27), which, for obvious reasons, would not have been competent had such been offered in evidence in this case. The report of the decision shows that your petitioner was not a party to that case or to such stipulations.

(Even if the alleged past method of settlement of respondent's accounting officers and the stipulations of the parties in the *Northern Pacific* case were competent, had been included in the Findings and could be properly considered, such would be inapplicable here. As shown by the Special Findings of Fact and the Land-Grant contract, there has been no abandonment of any part of the Siskiyou Route and no substitution in whole or in part for the longer aided and original line (The Siskiyou Route). See discussion in the opinion (R. 26).)

(c) The acquiescence by land-grant railroads, including your petitioner, in such administrative construction of respondent's accounting officers (R. 26, 27).

(See 21 Comp. Dec. 238, 24 Comp. Dec. 193, 3 Comp. Gen. 267, 15 Comp. Gen. 614, where the facts presented were different from the facts of this case and consistent with those stated in the opinion, but where the railroads protested instead of acquiescing as stated in the opinion.)

The following statements of fact or conclusions in the opinion of the Court of Claims, to which great weight appears to be attached, conflict with the court's Special Findings of Fact.

(a) That your petitioner secured or sought authority from the Interstate Commerce Commission to increase the existing rates over the Siskiyou Route (R. 25). This has

been discussed hereinbefore. The statement conflicts with Special Findings of Fact 16, 17 and 20 (R. 16-19, 19-20, 20-21). Your petitioner sought authority to reduce the rates via the Siskiyou Route under the Fourth Section of the Interstate Commerce Act sufficiently to enable competition with coastwise lines, which the Commission refused to grant.

(b) That the rates established and maintained by your petitioner over the Siskiyou Route were or are excessive rates (fifth line, R. 29). This has been discussed hereinbefore. The statement directly conflicts with Special Findings of Fact 17 (R. 19). The rates established and maintained via and on the Siskiyou Route were and are lower than found to be reasonable on that line by the Interstate Commerce Commission.

(c) By implication, that your petitioner forced shippers, including the United States, to use the Cascade Route instead of the Siskiyou Route by restricting the application of the lower scale of rates to the Cascade Route (R. 28-29). This has also been discussed hereinbefore. The laws of respondent, administered by the Interstate Commerce Commission, prevented the establishment of such rates via the Siskiyou Route and compelled their restriction to the Cascade Route. The statement in the opinion conflicts with Special Findings of Fact 16, 17 and 20 (R. 16-19, 19-20, 20-21).

Conclusion.

For the reasons set out herein and in the petition, your petitioner respectfully asks that the writ of certiorari prayed for be granted by this Honorable Court.

Respectfully submitted,

JAMES R. BELL,
Counsel for Southern Pacific Company, Petitioner.

Dated Washington, D. C., January 24, 1939.

APPENDIX.

Section 5 of the Act of July 25, 1866, 14 Stat. 239, Chap. 242, as amended by the Act of May 23, 1928, Part 1, 45 Stat. 722, Chap. 720, making the line of railroad on the Siskiyou Route between East Portland, Oregon, and Roseville, California, a 50 per cent land-grant line, covers the obligations of your petitioner and the rights of respondent so far as concerns the question here presented.

Section 5 of this Land-Grant Act of July 25, 1866, reads as follows:

> And be it further enacted, That the grants aforesaid are made upon the condition that the said companies shall keep said railroad and telegraph in repair and use and shall at all times transport the mails upon said railroad, and transmit despatches by said telegraph line for the government of the United States, *when required so to do by any department thereof*, and that the government shall at all times have the preference in the use of said railroad and telegraph therefor at fair and reasonable rates of compensation, not to exceed the rates paid by private parties for the same kind of service. And said railroad shall be and remain a public highway for the use of the government of the United States, free of all toll or other charges upon the transportation of the property or troops of the United States; and the same shall be transported over said road at the cost, charge, and expense of the corporations or companies owning or operating the same, *when so required by the government of the United States.* (Italics ours.)